SINGH (A.P.)

v.

SECRETARY OF STATE FOR THE HOME DEPARTMENT (SCOTLAND)

HOUSE OF LORDS
LORD TEMPLEMAN, LORD ACKNER,
LORD JAUNCEY OF TULLICHETTLE,
LORD BROWNE-WILKINSON,
LORD MUSTILL
15 OCTOBER 1992

IMMIGRATION LAWS: Deportation - Section 18, Immigration Act, 1971 - Regulation 3(4), Immigration Appeals (Notices) Regulations 1984 - Judicial review - Service of notice of deportation, whether necessary.

The appellant, of Indian nationality, entered the United Kingdom on a three month visa in order to marry. Upon the expiry of the three month period he went underground. Later the Secretary of State made a deportation order under s. 3(5) of the Immigration Act, 1971. Notice of this was sent to his last known place of abode and his sister's home. The appellant was traced to and arrested in Glasgow. He sought to challenge the validity of the deportation order by way of judicial review procedure.

The issues involved in this appeal were:

(1) Whether regulation 3(4) of the Immigration Appeals (Notices) Regulations 1984 is *ultra vires* s. 18 of the Immigration Act, 1971;
(2) Whether it was unreasonable for the Secretary of State to serve the appellant with a deportation notice at his last known place of abode.

Held:

[1] It is the intention of Parliament that the Secretary of State should be required to make the regulations to enable the persons concerned to appeal. It is not a mere discretion.

[2] Section 18(1) does not require the Secretary of State to give a notice where this cannot be effected and this does not result in a deportation being null and void.

[3] Regulation 3(4) applies where a person's present and last place of abode is unknown and operates only in rare cases.

[4] The persons concerned should provide the authorities with addresses to which notices may be given. If they fail to do so they should not complain if the notices fail to reach them. In the present case the Secretary of State had acted reasonably.

[Appeal dismissed].

Cases referred to:

Reg v. Immigration Tribunal, ex p. Ekrem Mehmet [1977] Imm. A.R. 56, [1977] 2 ALL ER 602 ***(refd)***
Makhan Singh v. Her Majesty's Secretary of State for Home Affairs ***(refd)***
Rhemtulla v. Immigration Tribunal Appeal [1979-80] Imm. A.R. 168 ***(refd)***

Legislation referred to:

Immigration Act 1971, ss. 1, 3(5), 13, 14, 15(1)(b), (2), & (5), 16, 18, 18(1)
Immigration Appeals (Notices) Regulations 1984 (S.I. 1984 No. 2040) Regulations 3(1), (4) & 6(a)(b)
Immigration Appeals (Procedure) Rules 1984 (S.I. 1984 No. 2041) Regulation 4(7)
Rules of the Supreme Court, O. 10 r. 1(2)(a)

JUDGMENT

Lord Templeman:

My Lords,

For the reasons contained in the speech to be delivered by my noble and learned friend Lord Jauncey of Tullichettle, I would dismiss this appeal.

Lord Ackner

My Lords,

I too would dismiss this appeal for the reasons given in the speech of my noble and learned friend, Lord Jauncey of Tullichettle.

Lord Jauncey of Tullichettle

My Lords,

There are two issues in this appeal from the Court of Session, namely

(1) whether regulation 3(4) of the Immigration Appeals (Notices) Regulations 1984 (S.I. 1984 No. 2040) (the "Notices Regulations") is *ultra vires* s. 18 of the Immigration Act 1971, and
(2) whether in the particular circumstances of the case the Secretary of State acted unreasonably in serving on the appellant at his last known place of abode in accordance with Regulation 6 of the Notices Regulations a notice of his decision to deport him.

The appellant entered the United Kingdom from India in February 1983 having been granted leave to remain for a period of three months in order to marry. He remained in the United Kingdom after the expiry of the three-month period without having applied for an extension and, on the advice of members of the Indian community in Birmingham, he "went underground". On 20 December 1985 the Secretary of State decided to make a deportation order under s. 3(5) of the Immigration Act 1971 and notice thereof was sent both to his last known address and to the home of his sister. The first notice was returned undelivered. On 13 June 1986 a deportation order was made. In early 1989 the appellant was traced to Glasgow and arrested. Thereafter he sought to challenge the validity of the deportation order by way of judicial review procedure. The Lord Ordinary refused to grant him the relief which he sought and the second division adhered to the interlocutor of the Lord Ordinary.

Section 1 of the Act of 1971 divides persons into those having a right of abode in the United Kingdom who are later referred to in the Act as patrials and those who require permission to live, work and settle in the United Kingdom. Section 3(1) provides that a person who is not patrial shall not enter the United Kingdom unless given leave with or without conditions to do so, and s. 3(5) provides that such a person shall be liable to deportation in certain specified circumstances, including his remaining beyond the time limited by his leave. Part II of the Act, which extends to some 12 sections, makes provision for appeals. Section 13 applies to persons who are refused leave to enter the United Kingdom. Section 14 allows persons who have a limited leave to enter or remain in the United Kingdom to appeal against a variation of that leave or a refusal to vary it. Section 15 provides for appeals against a decision of the Secretary of State to make a deportation order by virtue of s. 3(5) or a refusal, by him, to revoke a deportation order. Section 15(2) provides that a deportation order shall not be made under s. 3(5) during the period allowed for appeal against the decision to make it nor during the period of any pending appeal. Regulation 4(7) of the Immigrations Appeals (Procedure) Rules 1984 (S.I. 1984 No. 2041), which were made under powers contained in s. 22 of the Act, provides that Notice of an Appeal against a decision to make a deportation order may be given not later than 14 days after the decision. Thus the procedure involved in making a deportation order involves two stages, namely:

(1) the decision to make the order, which decision is appealable, and

(2) the making of the order if the decision is not appealed or any appeal is unsuccessful.

Section 18(1) of the Act is in the following terms:

> The Secretary of State may by regulations provide:
>
> (a) for written notice to be given to a person of any such decision or action taken in respect of him as is appealable under this part of this Act (whether or not he is in the facts of his case entitled to appeal) or would be so appealable but for the ground on which it is taken;
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> (b) for any such notice to include a statement of the reasons for the decision or action and, where the action is the giving of directions for the removal of any person from the United Kingdom, of the country or territory to which he is to be removed;
>
> (c) for any such notice to be accompanied by a statement containing particulars of the rights of appeal available under this part of this Act and of the procedure by which those rights may be exercised;
>
> (d) for the form of any such notice or statement and the way in which a notice is to be or may be given.

The Secretary of State first exercised his powers under the foregoing subsection in 1972 in Regulations which were revoked by the Notices Regulations. The latter Regulations provide *inter alia*:

> 3. (1) Subject to the following provisions of this Regulation, written notice of any decision or action which is appealable (or would be appealable but for the grounds of the decision or action) shall as soon as practicable be given in accordance with the provisions of these Regulations to the person in respect of whom the decision or action was taken.
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> ...
>
> 3. (4) It shall not be necessary for notice to be given in compliance with the provisions of paragraph (1) if the officer or authority required by paragraph (2) to give it has no knowledge of the whereabouts or place of abode of the person to whom it is to be given.
>
> ...

> 6. Any notice required by Regulation 3 to be given to any person may be delivered, or sent by post in a registered letter or by recorded delivery service to -
>
> (a) that person's last known or usual place of abode; or
> (b) an address provided by him for receipt of the notice.

Regulation 3(4) of the 1972 Notices Regulations was in terms identical to those of Regulation 3(4) of the 1984 Notices Regulations.

Mr. Mitchell, for the appellant, advanced two arguments in support of his motion that the appeal be allowed and the deportation order quashed. He submitted (first) that Regulation 3(4) was *ultra vires* s. 18 inasmuch as that section did not empower the Secretary of State to make regulations which dispensed altogether with the service of a Notice of a decision, and (second) that no notice had been given by the Secretary of State, because to send a notice to an address at which the appellant was known not to be abiding was unreasonable in the ***Wednesbury*** sense and did not therefore constitute compliance with Regulation 6. It followed therefore that no valid notice of the decision to deport having been given and there being no power in the Secretary of State to dispense by Regulation with the giving of notice the deportation order was invalid and should be quashed. In advancing the first argument Mr. Mitchell accepted that if it were correct it would be necessary for this House to overrule three English cases in which it had been held that Regulation 3(4) was *intra vires* s. 18.

In my view the first question to be addressed is the scope of s. 18. Differing views have been expressed in England as to whether the Secretary of State is required by the section to make regulations or whether he has a discretion as to the making or not making thereof. In *Reg. v. Immigration Tribunal, ex p. Ekrem Mehmet* [1977] Imm. A.R. 56, [1977] 2 All E.R. 602, Slynn J. (as he then was) in delivering the judgment of a Divisional Court consisting of Lord Widgery CJ, Forbes J. and himself, said at p. 66 that s. 18(1) gave the Secretary of State "a discretion as to whether and how he should make regulations". A few weeks later in *Makhan Singh v. Her Majesty's Secretary of State for Home Affairs* (reported only partially as a footnote at p. 66 in *Ekrem Mehmet*) Bridge LJ (as he then was) in the Court of Appeal said:

> When I look at s. 18(1), with all respect to the Divisional Court, I gravely doubt whether that is right and whether it can be said that Parliament intended to leave it to the Secretary of State to decide whether any regulations at all should be made under this section. I attach particular significance to paragraphs (b) and (c) of subsection (1). Paragraph (b) says that the regulations may provide for a notice to include a statement of the reasons for the decision, and by subsection (2) such a statement is made conclusive of the ground on which the decision was made. Under paragraph (c) provision may be made for the notice to be accompanied by a statement containing particulars which are designed to provide important safeguards for potential appellants of the rights of appeal available. Looking at these provisions, it seems to me that one should construe subsection (1) not as leaving it open to the Secretary of State's discretion whether he makes any regulations at all, but as requiring him to make regulations under the subsection.

My Lords, I entirely agree with the views of Bridge LJ on this matter and indeed would go further. Sections 13-16 of the Act confer rights of appeal upon persons in relation to various actions and decisions affecting them, such as refusal of leave to enter the United Kingdom, variations of limited leave to enter the United Kingdom, deportation orders and directions for removal. If those rights are to be effective the persons concerned must, where possible, be given such notice as will enable them to exercise the rights. In my view Parliament intended that the Secretary of State should be required to make regulations which would ensure, so far as practicable, that persons upon whom the rights of appeal had been conferred should be enabled effectively to exercise those rights. It follows that the Secretary of State does not have a discretion as to whether or not he shall make regulations.

The next question is what must be contained in those regulations. I turn to consider the three English cases which Mr. Mitchell asked your Lordships to overrule. In *Ekrem Mehmet* Slynn J. at p. 66 said: "Accordingly in our judgment Regulation 3(4) was made by the Secretary of State within the powers conferred upon him by s. 18 of the Immigration Act 1971". In *Makhan Singh*, in which the Court of Appeal held Regulation 3(4) to be *intra vires*, Lord Denning MR said:

> If a decision to deport is made, the structure of the Act contemplates that notice is to be given whenever the circumstances are such that notice can reasonably be given. Otherwise his right of appeal would be useless. But, if no notice can be given because it is impracticable (as a man's address or place of abode is not known) in these circumstances the regulations can provide that no notice is necessary. It cannot be supposed that the Act is to be rendered nugatory simply because a man has gone to ground and cannot be found. So sub-paragraph (4) is valid. It is not necessary for notice to be given if the Home Office has no knowledge of the present whereabouts or place of abode of the man.

Bridge LJ said:

> I am perfectly satisfied that the provision in regulation 3(4) of the 1972 regulations is *intra vires*, because it is an absurdity to suppose that Parliament intended to compel the Secretary of State to make a regulation requiring written notice to be served in a situation where in practical terms it is not possible to serve it; and it is perfectly legitimate and proper in my judgment for the regulations to spell out, as they do, an exception to the obligation to serve notice in a case where, as here, notice cannot be served because the Secretary of State does not know the whereabouts of the person upon whom notice would otherwise be required to be served.

Finally, in *Rhemtulla v. Immigration Tribunal Appeal* [1979-80] Imm. AR 168 the Court of Appeal once again held that Regulation 3(4) was *intra vires*. Bridge LJ at p. 174 said:

> As I have said that decision [***Makhan Singh***] (the reasoning of which I need not examine) is clearly and unmistakably to the effect that reg 3(4) of the Immigration Appeals (Notices) Regulations, which dispenses with the necessity for the notice on a person of whose whereabouts the Secretary of State has no knowledge is valid and *intra vires*. So that disposes once and for all of that point.

Mr. Mitchell submitted that these cases were wrongly decided. Section 18, although not requiring regulations made thereunder to provide for receipt as well as giving of notice, nevertheless required that some form of substituted service be provided for, such as edictal service or advertisement.

My Lords, I reject this submission and agree entirely with the reasoning of Lord Denning MR and Bridge LJ in ***Makhan Singh***. Section 18(1) requires the Secretary of State to make regulations for the purpose to which I have already referred but it does not require him to provide for the giving of notice in circumstances where there is no reasonable prospect of that notice being effective, nor does the subsection provide by implication that in no circumstances can a deportation order be made until notice has been given. So to provide would indeed place a premium on disappearance. When the Notices Regulations are looked at as a whole it appears that they have catered for all eventualities which can reasonably be anticipated. Regulation 3(1) provides for written notice of a decision being given as soon as practicable. Regulation 6 provides that any such notice shall be sent to a person's "last known or usual place of abode" or to an address provided by him for receipt of the notice. Regulation 3(4) dispenses with the notice if the "whereabouts or place of abode" of a person are unknown. Thus if a person's usual abode is known or if he has provided an address for service notice must be sent to that address. If his present abode is unknown but his last abode is known the notice will be sent there. If his present abode is unknown and he had no last known abode service is not required. In my view Regulation 3(4) is only intended to apply where a person's present and last known place of abode is unknown and it does not overlap with Regulation 6. Indeed, Regulation 3(4) is likely to operate only in rare cases, for example, where a person has given a false address or where his last known abode has ceased to exist for some reason such as demolition. My Lords, in my view s. 3(4) is a sensible provision which is undoubtedly *intra vires* s. 18(1).

I would add that in a situation where Regulation 3(4) is applied so that a deportation order has been made without notice of the decision to deport having been given, all is not necessarily lost for a non-patrial. He may apply for a revocation of the order and if his application is refused he may appeal against the refusal after he has left the United Kingdom (s. 15(1)(b) and (5)).

Mr. Mitchell's argument that service on a person at his last known abode when he is known not to be there is ***Wednesbury*** unreasonable also fails. It is to be noted that the attack is not on the *vires* of Regulation 6 but upon its exercise in the particular circumstances of this case. This argument necessarily involves construing "last known place of abode"

as meaning "last known place of abode at which there is reason to believe he might still be abiding". There is no warrant for such a construction. "Last known place of abode" means exactly what it says, no more and no less. If it is known where a person was living but it is not known where he is now living, the former is his last known place of abode at which the regulation directs notice to be given. The formula is well known. For example, Rules of Supreme Court, O. 10, r. 1(2)(a) provides for service of an originating process by posting to the defendant "at his usual or last known address". Furthermore in considering the question of reasonableness it must be remembered that persons having rights of appeal under Part II of the Act of 1971 are non-patrials who are only present in the United Kingdom by virtue of leave granted to them. It is therefore quite reasonable that they should provide the authorities with addresses to which notices may be given and if they fail so to provide they can hardly complain if notices do not reach them. In the present case the Secretary of State acted entirely reasonably in complying with the requirements of regulation 6 and indeed he went further than the regulations required him to go by sending notice of his decision both to the appellant's last known place of abode and to the address of his sister.

My Lords for all the foregoing reasons I would dismiss the appeal and affirm the *interlocutor* of the second division.

Lord Browne-Wilkinson

My Lords,

I too would dismiss this appeal for the reasons given in the speech of my noble and learned friend, Lord Jauncey of Tullichettle.

Lord Mustill

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Jauncey of Tullichettle. I agree with it, and for the reasons given, I too would dismiss this appeal.